



INFORMATION TECHNOLOGY INDUSTRY COUNCIL

May 8, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of Provision of Interstate and International Interexchange  
Telecommunications Service Via The "Internet" By Non-Tariffed,  
Uncertified Entities; RM No. 8775

Dear Mr. Caton:

I am enclosing an original and ten copies of comments by the Information  
Technology Industry Council (ITI) in response to RM No. 8775.

Sincerely,

Fiona Branton  
Director, Government Relations and Regulatory Counsel, ITI

No. of Copies rec'd 029  
List ABCDE

*The association of leading IT companies*

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In the Matter of )  
Provision of Interstate )  
and International Interexchange )  
Telecommunications Service Via )  
The "Internet" By Non-Tariffed, )  
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RM No. 8775

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**OPPOSITION OF**  
**THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

The Information Technology Industry Council (ITI) hereby submits these opposition comments in response to the above-captioned petition (the "Petition") filed by the America's Carriers Telecommunication Association (ACTA).<sup>1</sup> The Petition in effect invites the Commission to violate the Telecommunications Act of 1996 (the "Act")<sup>2</sup> by (i) banning certain customer premise software for the Internet; and (ii) regulating certain transmissions over the Internet. As demonstrated below, the relief sought by the Petition is contrary to law and the national interest and should therefore be rejected.

**I. Introduction And Summary**

When it adopted the Act, Congress was fully aware of the Internet and its dramatic growth in recent years. In Section 509 of the Act, Congress defined the Internet as "the international computer network of both Federal

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<sup>1</sup> ITI, formerly known as the Computer and Business Equipment Manufacturers Association ("CBEMA"), is a leading trade association of manufacturers and vendors of computer, computing devices, office equipment, and information services.

and non-Federal interoperable packet-switched data networks.” Sections 502 and 509 provide definitions of the products and services provided by the companies identified as the Respondents in the Petition – access software, access software provider, and interactive computer service.<sup>3</sup> None of these definitions provide authority for the Commission to grant the requests set forth in the Petition.

With the narrow exception of regulating the use of an “interactive computer service” to send “patently offensive” materials, the Act makes clear Congress’ unequivocal policy of preserving “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>4</sup> The Petition thus invites the Commission to disregard Congress’ policy by seeking to expand federal regulation of the Internet far beyond the narrowly circumscribed authority to regulate offensive materials provided in the Act.

The Petition seeks an immediate ban on the creators of software (“access software providers”) to prohibit them from creating and selling certain software (“access software”)<sup>5</sup> – a request that not only does violence to the Act but also to years of Commission precedent of not regulating customer premises equipment (“CPE”). The unregulated nature of CPE and enhanced services has led to a profusion of innovative products and services, wide choices for customers, and steadily declining prices. The Petition seeks to undo explicit Commission policies that have successfully promoted competition and consumer choice.

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<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56 (1996), 47 U.S.C. Sec. 151 et seq.

<sup>3</sup> 47 U.S.C. Section 223(h)(3). Section 230(e)(4) and (e)(2).

<sup>4</sup> Section 230(b)(2).

<sup>5</sup> See Petition at 4 (requesting the Commission to “issue an order to the Respondents to immediately stop arranging for, implementing, and marketing non-tariffed, uncertified telecommunications services. ..”).

**II. The Petition Would Have the Commission  
Move in a Regulatory Direction Contrary to Policies  
Embodied in the Telecommunications Act of 1996**

The Telecommunications Act of 1996 is a major step toward increasing competition and reducing regulation in the communications sector. For example, it eliminates legal barriers to entry into local telecommunications services<sup>6</sup> and it eliminates the Public Utilities Holding Company Act's restrictions on electric and gas utilities' entry into the telecommunications and information services businesses<sup>7</sup>. By requesting the Commission to regulate CPE and services that have heretofore been unregulated, the Petition would have the Commission move in a direction precisely opposite to the pro-competitive policies recently endorsed by Congress and the President.

By providing for competition in the public telecommunications networks, the Act will stimulate rapid introduction of new communications and information technology products and services and help accelerate development of a National Information Infrastructure. The NII will make possible an enormous variety of innovative new applications that will benefit American businesses and consumers, from electronic commerce to on-line medical services and improved educational opportunities. As recognized by Members of Congress and the Clinton Administration, previously noncompetitive industries are becoming more competitive, and existing regulations are being phased out. By requesting the extension of regulation to new areas, the Petition is entirely at odds with the express policies of the Act – to foster robust and unfettered competition, innovation, experimentation, and customer choice.

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<sup>6</sup> 47 U.S.C. Section 253(a).

<sup>7</sup> Section 103.

**III. The Products and Services Identified in the Petition  
Do Not Meet the Act's Definition of "Telecommunications Services"  
and Therefore Cannot be Regulated As Such**

The Petition urges the Commission to regulate the Internet because it is "a unique form of wire communication,"<sup>8</sup> and to regulate the Respondents because they are "purveyors of Internet long distance services."<sup>9</sup> However, the Act defines the Internet and related terms with some care. Those definitions do not provide the Commission with the authority to regulate the Internet or the sellers of software that enables the transmission of data packets over the Internet.

The Act specifically defines the Internet as "the international computer network of both Federal and non-Federal interoperable packet-switched data networks."<sup>10</sup> It does not define the Internet as a "telecommunications" network, service, or device, a term that is essential to the Petition's legal premise for the Commission's barring certain Internet software and regulating Internet voice communications.

The Act defines "telecommunications" as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>11</sup> A "telecommunications carrier" is defined as "any provider of telecommunications services . . .".<sup>12</sup> A "telecommunications service" is "offering of telecommunications for a fee directly to the public, or to such

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<sup>8</sup> Petition at 5.

<sup>9</sup> Petition at 6.

<sup>10</sup> 47 U.S.C. Section 230(e)(1).

<sup>11</sup> Section 153(48).

<sup>12</sup> Section 153(49).

classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>13</sup> Internet software publishers and Internet service providers are not telecommunications carriers because they do not offer telecommunications services. Instead, Internet software publishers sell software (“access software”) that enables computers with Internet access to use data packets to carry voice transmissions. The software that the Petition seeks to ban is specifically termed “access software” in the Act and is defined as:

[S]oftware (including client or server software) or enabling tools that do not create or provide the content of the communication but that allows a user to do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.<sup>14</sup>

The Respondents identified in the Petition are sellers of application software that enables the transmission of voice packets over the Internet. Under the Act, they are specifically termed “access software providers,” defined as:

[P]roviders of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.<sup>15</sup>

As “access software providers,” the Respondents cannot be deemed to be “telecommunications carriers,” and access software cannot be deemed

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<sup>13</sup> Section 153(51).

<sup>14</sup> Section 223(h)(3).

<sup>15</sup> Section 230(e)(4).

“telecommunications services.” Thus, the Commission should deny the Petition’s request to ban “Respondents” from “arranging for, implementing and marketing non-tariffed, uncertified telecommunications services.”<sup>16</sup>

Even if Respondents are acting as interactive service providers, they cannot be considered telecommunications providers under the Act. Section 509 of the Act specifically defines an “interactive computer service” as:

Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.<sup>17</sup>

The Petition does not and cannot establish as a matter of law that “interactive computer services” are “telecommunications services” subject to tariffing or other regulation by the Commission. The Act expressly excludes interactive computer services from the definition of a “telecommunications device” and excludes providers of interactive computer services from being defined as “common carriers” or “telecommunications carriers.” Section 502 of the Act notes that “(t)he use of the term ‘telecommunications device’ in this section- ... (B) does not include an interactive computer service.”<sup>18</sup> The Act further notes that “(n)othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.”<sup>19</sup> The Commission does not therefore have the authority under the Act to regulate Internet service providers as common carriers or telecommunications carriers, and the Petition’s request for the Commission

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<sup>16</sup> Petition at 4.

<sup>17</sup> 47 U.S.C. Section 230(e)(2).

<sup>18</sup> Section 223(h)(1).

<sup>19</sup> Section 223(e)(6).

to undertake a rulemaking in order to regulate permissible traffic over the Internet is not supported by the Act.

#### **IV. Internet Software is Unregulated and Should Remain Unregulated**

Even if the Commission were to possess the statutory authority to ban the “access software” for the purposes set forth in the Petition, the Commission could not do so at the present time. It must, through a rulemaking or other applicable proceeding, first entirely reverse its long-standing policies – set forth in its Computer II decision<sup>20</sup> – of not regulating customer premise equipment. Should the Commission decide that it may legally ban certain Internet software or otherwise regulate the Internet, the Commission would be compelled to reverse the very policies that have led to U.S. industry’s success and leadership in computing, data processing and the entire range of other CPE and enhanced services – policies that have been confirmed and extended by Congress in the Telecommunications Act.

The sole objective of the Petition is to eliminate certain transmissions over the Internet in order to avoid the possibility of “economic hardship” to ACTA’s members.<sup>21</sup> This is not a permissible purpose set forth under the Act for the Commission to regulate the Internet or interactive computer services, as it would be contrary to the public interest. An unregulated Internet best serves the public interest by ensuring the greatest choice of competitive services at the lowest cost.

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<sup>20</sup> Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC.2d 384, 430 (1980) [hereinafter “Computer II”].

<sup>21</sup> Petition at 4.



Personal computer software is unregulated under long-standing Commission precedent.<sup>22</sup> The Commission's decision not to regulate CPE and enhanced services was well-founded and has spawned numerous business successes and provided the U.S. the leadership it now enjoys in information technology. Any move by the Commission to regulate any form of Internet software, any providers of such software, or other such products would represent a huge step backward toward fewer choices for consumers, less competition, and reduced innovation.

#### **V. Regulating the Internet Would Contravene Congressional Policy and the Public Interest**

Express findings and policies set forth in the Act preclude regulation of the Internet and software providers. The Act establishes that Congress intended that the Internet remain unfettered by regulation.<sup>23</sup> The Act specifically notes that the rapidly developing array of Internet and other interactive computer services available to individual Americans represent "an extraordinary advance in the availability of educational and informational resources to our citizens."<sup>24</sup> Further, Congress found that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans with a minimum of government regulation," and "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."<sup>25</sup>

The Act explicitly states that Federal policy with respect to the Internet should promote "the continued development of the Internet and other interactive computer services and other interactive media" and preserve "the

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<sup>22</sup> Computer II.

<sup>23</sup> 47 U.S.C. Section 230(b)(2).

<sup>24</sup> Section 230(a)(1).

<sup>25</sup> Section 230(a)(4) and (5).

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."<sup>26</sup> Banning software that enables the transmission of voice packets over the Internet and regulating voice transmissions over the Internet as requested by the Petition would flatly contradict these policies.

The Act limits regulation of the Internet or of interactive computer services to the use of interactive computer services for transmitting offensive material. Under the doctrine of *expressio unius est exclusio alterius*, the Commission does not have the statutory authority to regulate the Internet as requested in the Petition. Under this maxim of statutory construction, Congress' specific designation of a single area of Internet regulation ("offensive materials") and express policy of keeping the Internet free from regulation must be read to mean that Congress intended to exempt the Internet from other regulation.

The Internet – a U.S.-originated international computer network capable of carrying packetized bits of various combinations of data, audio and video transmissions<sup>27</sup> – is a U.S. strength. Unregulated, the Internet has grown exponentially, giving birth to numerous small, medium and large businesses. It is proving to be an unmitigated success – in large part due to its unregulated nature and its ability to respond rapidly to changing consumer demands and rapidly changing technology. The relief requested in the ACTA petition – both the request for immediate relief and the overall thrust of the petition – would lead to unprecedented regulation that will stifle the growth of the Internet and slow the emergence of new applications. The complexity of the Internet and the profusion of creative multimedia businesses the

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<sup>26</sup> Section 230(b)(1) and (2) (emphasis added).

<sup>27</sup> It is critical for the Commission to note that all digital communications over the Internet are just that -- digital communications, regardless of whether the "bits," or series of 1s and 0s, represent data, audio or video transmissions.

Internet has spawned guarantee that any attempt to formulate regulatory rules and distinctions will retard innovation, growth of the Internet and the national economy; cause distortions and dislocations as business will driven to respond to regulatory disincentives; and not be manageable or implementable.

## VI. Conclusion

The Internet should be viewed by all individuals and businesses (including ACTA's membership), and by the Commission and regulators worldwide as an enormous economic opportunity, and not as a public threat that warrants banning products or additional regulation. The Commission should foster, not retard, innovation, experimentation and economic development and growth on the Internet, and set an appropriate example for foreign governments who may be tempted to regulate the Internet.

Based on the foregoing, the Commission should expeditiously reject all of the demands set forth in the Petition.

Date: May 8, 1996

Respectfully submitted,

A handwritten signature in black ink, reading "Fiona Branton". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

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Regulatory Counsel  
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